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91-1492

Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1991

DAVID LEE PHILLIPS,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

POTTER LAW OFFICES

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Las Vegas, NV 89102
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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER AN ATTORNEY CHARGED AND LATER SUSPENDED FOR CONDUCT ALLEGEDLY VIOLATIVE OF A STATE'S RULES OF PROFESSIONAL RESPONSIBILITY IS DENIED DUE PROCESS WHERE THE CHARGING INSTRUMENT ASSERTING SAID VIOLATIONS FAILS TO PROVIDE SUFFICIENT NOTICE OF THE NATURE OF THE CHARGES AND DENIES THE ATTORNEY AN ADEQUATE OPPORTUNITY TO PREPARE A DEFENSE TO THE CHARGES?

2. WHETHER THE NEVADA SUPREME COURT RULE 165, WHICH IS A RULE OF PROFESSIONAL RESPONSIBILITY REGULATING AN ATTORNEY'S SAFEKEEPING OF PROPERTY, IS VAGUE AND OVER-BROAD, AND THEREFORE, IN VIOLATION OF DUE PROCESS?

3. WHETHER AN ATTORNEY SUSPENDED FOR VIOLATING A STATE'S RULE OF PROFESSIONAL RESPONSIBILITY IS DENIED DUE PROCESS BY THE ARBITRARY AND CAPRICIOUS APPLICATION OF THAT RULE BY THAT STATE'S HIGHEST COURT?

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OPINIONS BELOW

On December 6, the Supreme Court of Nevada issued an opinion in this case, a copy of which appears in the Appendix to this Petition, pp. A-1. The opinion has not yet been reported. On December 30, 1991, the Supreme Court of Nevada entered an Order Denying Rehearing in this case, a copy of which appears in the Appendix to this Petition, pp. A-4. On April 1, 1991, the State Bar of Nevada, via the Southern Nevada Disciplinary Board Hearing Panel, submitted Findings and Recommendations, a copy of which appears in the Appendix to this Petition, pp. A-5.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on December 6, 1991. The Order Denying Rehearing on this same cause was entered on December 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Said section reads as follows:

> [No Person shall be] . . . , nor be deprived of life, liberty, or property, without due process of law; . . .

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Pursuant to a preliminary investigation and subsequent Complaint filed by the State Bar of Nevada, the Southern Nevada branch of the State Bar Disciplinary Board conducted an evidentiary hearing on various dates in March, 1991, to determine whether Attorney David Lee Phillips violated Nevada Supreme Court Rule [hereinafter referred to as SCR] §§ 165(1) and (2), in consolidated matters designated by Case Numbers 89-165-44 and 89-167-44.

In its Findings and Recommendations dated April 1, 1991, the Disciplinary Board Hearing Panel determined that Phillips violated the aforementioned rules of professional conduct as alleged in the Complaint.

The Supreme Court of Nevada had jurisdiction over this matter via an automatic appeal from a decision of the

State Bar pursuant to Nevada SCR § 105(3)(b). On December 6, 1991, the Supreme Court of Nevada entered its Order of Suspension, which adopted the recommendations of the Southern Nevada Disciplinary Board in their entirety. *Inter alia*, Attorney Phillips was suspended from the practice of law for a period of six months and one day.[1]

Attorney Phillips was charged with two distinct counts of violating Supreme Court Rules (SCR) §§ 165(1) and 165(2). *See*, Complaint, attached at Appendix, pp. A-11. Those sections read as follows:

> 1. A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept, in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.
>
> 2. Upon receiving funds or other property in which a client or third person has an interest, a

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[1] The significance of this particular length of suspension is that, pursuant to Nevada SCR §§ 116(1) and 116(3), a suspension of more than six months requires a reinstatement proceeding wherein the suspended attorney carries the burden of demonstrating by clear and convincing evidence that he has the moral qualifications, competency, and learning in law required for readmission to practice law.

> lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

COUNT I

Count one of the Complaint alleged that Phillips violated the above-cited rules by submitting a trust fund check to a client for $869.00 dollars which was subsequently returned for insufficient funds. For purposes of this Petition, the Nevada Supreme Court's determination that Phillips' conduct in this regard constituted a violation of SCR §§ 165(1) and (2) is not at issue.

COUNT II

In the course of several meetings and conversations occurring in June of 1989, Phillips received $21,000 from the friend of an inmate named Jim Carson. At the time, it was Phillips' belief that the aforementioned monies represented partial payment of a $25,000 retainer fee Phillips indicated he would charge to represent Carson on a direct appeal of his sexual assault conviction.

On or about July 23, 1989, Phillips met with Jim Carson at the prison, and the two discussed his representation of Carson on appeal. That conversation included

case strategy as well as a discussion of fees. Thereafter, Carson began to fire and rehire Phillips on an almost daily basis, and paid no further amounts to cover the costs of his appeal.

As a result of Carson's indecision, Phillips deposited a $19,000 of the money received from Carson (through his friend) into his client trust account. Phillips did this because of Carson's erratic behavior, and in the hope that funds would be available to cover the costs incurred in preparing Carson's appeal, including transcript costs. Eventually, Phillips paid out over $7,000 to cover the costs of transcript preparation.

Relatives of Mr. Carson eventually retained another attorney on Carson's behalf. That attorney was led to believe by Carson that the funds held by Phillips were held in trust, and therefore did not constitute a retainer fee.

In a letter to Phillips dated November 9, 1989, Carson's new attorney requested Carson's file and an accounting of the monies which remained in Phillips' trust account. Phillips applied a quantum meruit analysis to his services for Carson in determining how much of the retainer fee to refund. Thereafter, on December 29, 1989, Phillips sent a check to Carson's new attorney in the amount of $9,577.45.

Count Two of the State Bar of Nevada's Complaint against Phillips alleges as follows:

> [Phillips] received *retainer fees* totaling $21,000 from Gregg Freed in June and July 1989 for the purpose of representing Jim Carson in an appeal

> of a criminal conviction. [Phillips] was terminated shortly thereafter by Jim Carson, who repeatedly requested an accounting of the funds held in the [Phillip's] trust account. [Phillips] failed to promptly account to his client and failed to promptly return the unused portion of the *funds held in trust*. [Phillips] *misappropriated* a substantial portion of said funds from July 31, 1989, to December 8, 1989, until a cashier's check for $9,577.45 was tendered. [Phillips'] actions were in violation of Supreme Court Rules (SCR) 165.1 and 165.2. [emphasis added].

At the hearing before the Southern Nevada Disciplinary Board Hearing Panel, Phillips maintained that the $21,000 received from Carson (through his friend acting with power of attorney) was understood to be a non-refundable retainer fee, earned upon receipt. The money was never intended to be "held in trust."

Although Count Two of the Complaint against Phillips explicitly asserts that the subject monies were "retainer fees," Bar Counsel proceeded at the hearing to allege that the subject monies were in fact to be held in trust for Mr. Carson.

Nothing in the Complaint provided Phillips with notice that the characterization of the monies as "retainer fees" would be an issue at the hearing. For this reason, he was not prepared to defend against Bar Counsel's significant departure from this factual contentions in the Complaint, and asserted a due process violation upon appeal to the Supreme Court of Nevada. That court specifically concluded that "Phillips was not denied fair notice of the charge against him because the complaint referred to the Carson funds as being retainer fees." Appendix, pp. A-2.

The Findings of the Hearing Panel did not resolve the character of the subject monies. In fact, the Hearing Panel determined only that Phillips "received monies . . . for the purpose of representing client Jim Carson and/or to hold in trust on behalf of client Jim Carson . . . " Nevertheless, in recommending a discipline of suspension, the Hearing Panel submitted the following conclusions:

> A. [Phillips] did not, upon repeated request, promptly render a full accounting of the $21,000.00, therefore violating SCR 165(2); [Phillips] did not promptly deliver funds to Attorney William Smith, therefore violating SCR 165(2).
>
> B. [Phillips] did not hold property of his clients or third persons that was in his possession separate from his own property, therefore violating SCR 165(1); and [Phillips] did not properly identify and appropriately safeguard the property of his client or third party, and in violation of SCR 165(1).

In approving all of the Board's findings and recommendations for discipline, the Supreme Court of Nevada also failed to consider the nature of the funds received by Phillips, nor even acknowledged the significance of the fact that the Bar Complaint characterized the monies as retainer fees.[2]

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[2] The Supreme Court of Nevada declined to schedule oral argument and denied a request for reconsideration of its decision to afford oral argument.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY ENDEAVOR TO SETTLE AND DESCRIBE WITH SPECIFICITY THE CONDUCT ALLOWABLE UNDER THE MODEL RULES REGARDING THE SAFEKEEPING OF CLIENT PROPERTY.

The conduct of attorneys is essentially and primarily self-regulated through rules of professional responsibility enforced by state bar associations. Nevada SCR § 165 is a verbatim adoption of the Model Rules of Professional Responsibility promulgated by the American Bar Association. *See, Model Rules of Professional Conduct* 1.15 (1988). This case raises issues regarding attorney conduct which, if addressed by this Honorable Court, would benefit and guide much of the practicing bar in this country.

The particular rule of professional responsibility at issue here is not a sufficient guideline for the conduct of attorneys. The vagueness and overbreadth of this professional rule prejudiced Phillips because he had no reason to suspect that his receipt of what was undisputedly a retainer fee could or would be construed as "client property" under this rule. On its face, the plain meaning of the rule would seem to militate against such an interpretation. Moreover, there is ample authority for the proposition that a retainer fee is earned by the attorney *when paid*, since the attorney is entitled to the money regardless of whether he actually performs any services for the client. *See e.g., Baronowski v. State Bar*, 24 Cal. 3d 153, 154 Cal. Rptr. 752, 593 P.2d 613 (1979).

Attorneys should not be resigned to simply guess about whether their conduct conforms to the rules of professional responsibility. Also, attorneys should not be deprived of notice of the specific charges against them when misconduct is alleged by a State Bar. In the instant case, the State Bar of Nevada varied significantly and prejudicially from the factual assertions in its Complaint against Phillips, leaving him little or no means of counteracting the novel assertions proffered by Bar Counsel at Phillips' disciplinary hearing.

In failing to acknowledge or remedy the due process violation suffered by Phillips at his disciplinary hearing, the Supreme Court of Nevada, in upholding the disciplinary board's recommendation of suspension, has itself acted arbitrarily and capriciously, and denied Phillips due process thereby.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Supreme Court of Nevada in *Phillips v. State Bar of Nevada*. In the event that the Petition is granted, Petitioner prays that the Order of Suspension of the Court below be reversed, that the cause be remanded for proceedings consistent with this Court's decision.

DATED this 4th day of February, 1992.

Respectfully Submitted,

POTTER LAW OFFICES

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Las Vegas, NV 89102
(702) 385-1954
Attorneys for Petitioner

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF)	No. 22164
DAVID LEE PHILLIPS.)	(Filed Dec. 06, 1991)
)	

ORDER OF SUSPENSION

This is an automatic appeal from a decision of the Southern Nevada Disciplinary Board of the State Bar of Nevada recommending that attorney David Lee Phillips be suspended from the practice of law in this state for a period of six months and one day. *See* SCR 105(3)(b) (an appeal of a decision of the disciplinary board recommending suspension shall be automatically commenced in the supreme court by the filing of the record of the disciplinary proceedings within thirty days of the board's decision). Further, the board recommends that prior to his reinstatement, Phillips take and pass the Multi-State Professional Responsibility Examination, complete ten hours of continuing legal education in the field of law office management, and establish a proper trust account system satisfactory to bar counsel. The board also recommends that the State Bar of Nevada be allowed to inspect Phillips' business accounts and records for a period of one year after reinstatement, and that Phillips be assessed all costs of the disciplinary proceedings. Having reviewed the record and the briefs of the parties, we conclude that the findings of the board are supported by

clear and convincing evidence, and we approve the board's recommendations.[1]

First, we note that the evidence before the panel clearly demonstrates that on September 26, 1989, Phillips issued client Trenise Ratcliff a check drawn on his trust account in the amount of $869.00. The check was returned because Phillips had not kept sufficient funds in his trust account. From these facts, it is clear that Phillips failed to keep all of his client's money in the trust account. We reject Phillips' contention that in order to find a violation of SCR 165, it was necessary for the panel to find an intentional commingling or misappropriation. The panel correctly concluded that Phillips failed "to hold property of clients or third persons . . . separate from [his] own property." *See* SCR 165(1).

Second, the evidence clearly established that the $19,000 received by Phillips on behalf of James Carson belonged to James Carson and not to Phillips. Phillips deposited this money in his trust account and represented to third parties that he was holding this money in trust for client James Carson. Testimony and evidence before the panel established that Phillips failed to maintain this money in his trust account and failed to promptly account for and return the money when requested. The panel correctly concluded that Phillips thereby violated SCR 165(1) and 165(2).

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[1] Pursuant to this court's order of May 20, 1991, we have determined that oral argument of this appeal is not warranted.

Third, we reject Phillips' contention that the hearing panel deprived him of due process. Specifically, we conclude that Phillips was not denied fair notice of the charge against him because the complaint referred to the Carson funds as being retainer fees. Further, Phillips was not deprived of due process by the panel's refusal to allow him to file a post-hearing brief. In this regard, we note that pursuant to SCR 105(2)(d), the panel has discretion whether to allow the filing of post-hearing briefs. Phillips' counsel had an opportunity during closing argument to cite legal authority if he wished. Thus, we conclude that Phillips' contentions on appeal are without merit.

Accordingly, we approve the board's recommendations, and we suspend Phillips from the practice of law in this state for a period of six months and one day. Reinstatement shall be subject to Phillips' compliance with the terms set forth in the board's findings and recommendations, and any future application for reinstatement shall be made in accordance with SCR 116. Finally, the parties shall comply with the notice provisions of SCR 115.

It is so ORDERED.

/s/ Mowbray, C.J.
Mowbray

/s/ Springer, J.
Springer

/s/ Rose, J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

cc: William B. Terry, Chairman, Southern Nevada Disciplinary Board
Rosalie Small, Executive Director
Sheldon A. Breskow, Bar Counsel
Louis Wiener
Potter Law Offices

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF)	No. 22164
DAVID LEE PHILLIPS.)	(Filed Dec. 30, 1991)
_____)	

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

/s/ Mowbray, C.J.
Mowbray

/s/ Springer, J.
Springer

/s/ Rose, J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

cc: William B. Terry, Chairman, Southern Nevada Disciplinary Board
Rosalie Small, Executive Director
Sheldon A. Breskow, Bar Counsel
Louis Wiener
Potter Law Offices

[1] We deny appellant's motion to stay imposition of discipline pending our resolution of this petition for rehearing.

CASE NOS. 89-165-44 and 89-167-44

STATE BAR OF NEVADA

SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA, Complainant, vs. DAVID LEE PHILLIPS, Respondent.	FINDINGS AND RECOMMENDATIONS OF HEARING PANEL

The hearing on the allegations contained in the Complaint in the above-captioned consolidated matters having come before the duly appointed hearing panel of the Southern Nevada Disciplinary Board of the State Bar of Nevada on March 19th, March 20th and March 26, 1991; the Complainant having been represented by James Mancuso, Esq., and the Respondent having been represented by Louis Weiner, Jr., Esq. and Thomas J. Gilloon, Esq.; the hearing panel having heard the testimony and reviewed the evidence, makes the following findings and recommendations pursuant to Supreme Court Rule 105:

COUNT ONE

The following facts have been proven by the Complainant by clear and convincing evidence:

1. Respondent represented Trenise Ratcliff in a personal injury matter.

2. Respondent settled the personal injury matter on behalf of his client, Trenise Ratcliff, and received funds

from a third party on her behalf as proceeds of the settlement.

3. On or about September 26, 1989, Respondent issued check No. 1923, drawn on his Trust Account, made payable to client Trenise Ratcliff as and for her share of the settlement proceeds pursuant to Respondent's fee agreement with client Trenise Ratcliff. Said check was in the amount of $869.00 as "full settlement" of the case.

4. Respondent's Trust Account check No. 1923 issued to client Trenise Ratcliff was returned "insufficient funds" because Respondent's Trust Account did not contain sufficient funds to satisfy the amount of the check.

5. Respondent knowingly and without explanation failed to balance or reconcile his Trust Account during the time frame concerning the Ratcliff transaction.

Based on the foregoing, the panel concludes that:

A. Respondent did not hold property of clients or third persons separate from his own property, and therefore violated SCR 165; Respondent did not keep funds in a separate account nor properly safeguard said funds and again violated SCR 165.

COUNT TWO

The following facts have been proven by the Complainant by clear and convincing evidence:

1. Respondent received monies totalling $21,000.00 from Greg Freed in June and July, 1989, for the purpose of representing client Jim Carson and/or to hold in trust on behalf of client Jim Carson, pending a final determination

whether or not Respondent would represent client Jim Carson.

2. Respondent deposited said $21,000.00 into his Trust Account.

3. Respondent represented to third parties Robert Carson, the father of client Jim Carson, and the Honorable Eighth Judicial District Court Judge Jack Lehman, that he was holding these monies in trust for client Jim Carson.

4. Respondent had been requested on numerous occasions by client Jim Carson, Robert Carson and Attorney William Smith to provide a full accounting of these funds and to promptly deliver said funds back to either Jim Carson, Robert Carson or Attorney William Smith.

5. Respondent failed to at any time provide an accounting of these funds to either Jim Carson, Robert Carson or Attorney William Smith, nor did Respondent promptly deliver said funds to Attorney William Smith.

6. Respondent failed to maintain the $21,000.00 in his Trust Account and did not identify and appropriately safeguard said funds.

Based upon the foregoing, the panel concludes that:

A. Respondent did not, upon repeated request, promptly render a full accounting of the $21,000.00, therefore violating SCR 165(2); Respondent did not promptly deliver funds to Attorney William Smith, therefore violating SCR 165(2).

B. Respondent did not hold property of his clients or third persons that was in his possession separate from

his own property, therefore violating SCR 165(1); and, Respondent did not properly identify and appropriately safeguard the property of his client or third party, again in violation of SCR 165(1).

MISCELLANEOUS FINDING

The panel further finds by clear and convincing evidence that Respondent was not candid in his testimony before the panel.

The panel further finds by clear and convincing evidence that no information or evidence was presented to the panel in mitigation, nor was there any indication whatsoever that Respondent has taken any steps to correct his errors.

RECOMMENDATION

Based upon the foregoing findings and conclusions, and the consideration of Respondent's lack of prior history of disciplinary offenses, the panel, by a concurrence of four or more members, makes the following recommendations:

1. Respondent shall be suspended from the practice of law for a period of six months and one day.

2. That Respondent, before being reinstated to the practice of law pursuant to SCR 116, must satisfy the following conditions:

A. take and pass the Multi-State Professional Responsibility Exam (MPRE);

B. agree to random audits of all business accounts and records, pursuant to direction and supervision of State Bar, for a period of one year after reinstatement, costs to be paid by Respondent;

C. complete ten hours of Continuing Legal Education in the field of Law Office Management;

D. establish a proper trust account system satisfactory to State Bar Counsel; and

E. pay for all costs of disciplinary proceedings.

DATED this 1 day of April, 1991.

State Bar of Nevada
Southern Nevada
Disciplinary Board

/s/ Steven B. Wolfson
STEVEN B. WOLFSON
Chairman, Hearing Panel

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Carole M. Marringer, being sworn, says that she is a citizen of the United States, over 21 years of age, a resident of Clark County, and not a party to the within action. This affiant's business address is 500 S. Third Street, Suite #2, Las Vegas, Nevada 89101.

That affiant served a copy of the attached FINDINGS AND RECOMMENDATION OF HEARING PANEL by placing a copy in an envelope addressed to David Lee Phillips, at his address of 700 S. 4th Street, Las Vegas, Nevada 89101, which envelope was then sealed and postage fully prepaid thereon for first-class mail, certified, return receipt requested, and thereafter was on the 5th day of April, 1991, deposited in the United States mail at Las Vegas, Nevada. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

/s/ Carole M. Marringer
Carole M. Marringer,
An Employee of the
State Bar of Nevada

SUBSCRIBED AND SWORN to
before me this 5th day of
April, 1991.

Illegible
NOTARY PUBLIC

[SEAL]

CASE NOS. 89-165-44 AND 89-167-44

STATE BAR OF NEVADA
SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA, Complainant, vs. DAVID LEE PHILLIPS, Attorney at Law, Respondent.	)	COMPLAINT

TO: DAVID LEE PHILLIPS, ESQ.
700 SOUTH FOURTH STREET
LAS VEGAS, NEVADA 89101

PLEASE TAKE NOTICE that pursuant to Supreme Court Rule (SCR) 105.2 a response to this Complaint must be filed with the Southern Nevada Disciplinary Board Chairman, William B. Terry, Esq., 530 South Seventh Street, Las Vegas, Nevada 89101, and a copy must be served on John E. Howe, Esq., Bar Counsel, State Bar of Nevada, 500 South Third Street, Suite 2, Las Vegas, Nevada 89101, both within twenty (20) days of service of this Complaint.

Complainant, State Bar of Nevada, by and through its Bar Counsel, John E. Howe, alleges that Respondent, David Lee Phillips, is now and at all times pertinent herein was, a licensed and practicing attorney in the State of Nevada, having his principal place of business for the practice of law in Clark County, Nevada, and that he

engaged in acts of misconduct warranting the imposition of professional discipline as set out herein:

COUNT 1

Respondent represented Trenise Ratcliff in connection with a personal injury case. On or about September 26, 1989, Respondent issued a check, drawn on his trust account, to Trenise Ratcliff for her portion of the settlement proceeds. Said check in the amount of $869.00 was returned because Respondent's trust account did not contain sufficient funds to cover the item. Respondent's actions were in violation of Supreme Court Rules (SCR) 165.1 and 165.2.

COUNT 2

Respondent received retainer fees totalling $21,000 from Gregg Freed in June and July 1989 for the purpose of representing Jim Carson in an appeal of a criminal conviction. Respondent was terminated shortly thereafter by Jim Carson, who repeatedly requested an accounting of the funds held in the Respondent's trust account. Respondent failed to promptly account to his client and failed to promptly return the unused portion of the funds held in trust. Respondent misappropriated a substantial portion of said funds from July 31, 1989, to December 8, 1989, until a cashier's check for $9,577.45 was tendered. Respondent's actions were in violation of Supreme Court Rules (SCR) 165.1 and 165.2.

WHEREFORE, Complainant prays as follows:

1. That a hearing be held pursuant to Nevada Supreme Court Rule (SCR) 105;

2. That Respondent be assessed the costs of the disciplinary proceeding pursuant to Supreme Court Rule (SCR) 120.1; and

3. That pursuant to Supreme Court Rule (SCR) 102, such disciplinary action be taken by the Disciplinary Board for the Southern District of Nevada against Respondent as may be deemed appropriate under the circumstances.

DATED this 10th day of December, 1990.

STATE BAR OF NEVADA

By: /s/ John E. Howe
JOHN E. HOWE, Bar Counsel
Nevada Bar #3149
500 S. Third St., Suite 2
Las Vegas, Nevada 89101
(702) 382-0502

CERTIFICATE OF SERVICE

I, Cal J. Potter, III, Esq., a member of the Bar of the Supreme Court of the United States and counsel of record for David Lee Phillips, Petitioner herein, hereby certify that on February 4, 1992, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing PETITION FOR WRIT OF CERTIORARI on each of the parties herein, as follows:

On the State Bar of Nevada, Respondent herein, by depositing such copies in the United States Post Office,

Las Vegas, Nevada, with first class postage prepaid, properly addressed to the post office address of Sheldon Breskow, Bar Counsel, the above-named Respondent's counsel of record, at 201 Las Vegas Boulevard South, suite 200, Las Vegas, Nevada, 89101.

All parties required to be served have been served.

DATED February 4, 1992.

/s/ Cal J. Potter
Cal J. Potter, III, Esq.
1125 Shadow Lane
Las Vegas, NV 89102

Supreme Court, U.S.
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No. 91-1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID LEE PHILLIPS,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Las Vegas, Nevada 89101

Attorney for Respondent
State Bar of Nevada

No. 91-1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID LEE PHILLIPS,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully moves the Court to deny the Petition for Certiorari, in the alternative, to affirm the judgment of the Supreme Court of Nevada on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

The Respondent will respond below in its Argument to each of the two (2) questions presented by Petitioner.

OPINIONS BELOW

The order giving rise to Petitioner's Petition for Certiorari was made and entered by the Supreme Court of Nevada suspending Petitioner from the State Bar of Nevada for six (6) months and one (1) day. ***In re: Discipline of David Lee Phillips (Dec. 6, 1991) not yet reported.*** (Appendix A-1 to A-3, to Petition for Writ of Certiorari).

JURISDICTION

Petitioner has failed to raise any substantial federal questions by his petition and, therefore, has failed to invoke the jurisdiction of the Supreme Court of the United States. Additionally, Petitioner has failed to demonstrate by the record or by argument any right to review.

STATUTES INVOLVED

Petitioner has fairly summarized those provisions of the various constitutional provisions, statutes and court rules that he claims have application to the questions presented.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" appears on pp. 2-8, inclusive, of his Petition for Writ of Certiorari. A substantial portion of Petitioner's Statement is immaterial and irrelevant to the proceeding which is the subject of this matter. For example, Petitioner attempts to relitigate the order of suspension entered by the Hearing Panel and the Supreme Court of Nevada on December 6, 1991. The record shows that the Petitioner was suspended by order of the Supreme Court of Nevada.

A more concise and accurate statement of the case appears in the argument portion of this brief.

ARGUMENT

Petitioner makes two constitutional claims, neither of which is substantial. The first is that Nevada Supreme Court Rule 165 is vague and over-broad. The rule is set out in its entirety at page three (3) of the Petition for Writ of Certiorari.

The Petitioner also claims a constitutional violation in the application of the rule by his second constitutional challenge that he was denied due process of law because the Bar Complaint alleged that he had received a **retainer fee,** but that the proof was that he had received Twenty-One Thousand dollars and no/100 ($21,000.00) to hold in trust for a prospective client. It is axiomatic that pleadings conform to the proof at trial of a noncriminal matter. The fact that funds received by petitioner were labeled retainer fees in the Bar Complaint, but the proof was they were intended to be held by Petitioner in a fiduciary capacity, can hardly rise to the level of a substantial federal due process claim.

The distinction between retainer fees and fiduciary funds required to be safely kept by the ethical rules of the Bar is arguably misplaced by the Petitioner. Unearned retainer fees are required to be held by an attorney under the ethical opinions of the Bar.

Petitioner acknowledges that the Nevada Supreme Court Rule which he challenges is identical to the American Bar Association's **Model Rules of Professional Conduct** Rule 1.15 dealing with safekeeping of property. See also the (1970) ABA Model Code of Professional Responsibility DR 9-102 which was the forerunner to the challenged rule, and is substantially the same as ABA Model Rule 1.15. So that the rule in Nevada which Petitioner challenges has been the Organized Bar's ethical rule for safekeeping of property for over 22 years. Even a casual reading of the rule makes it

clear that it is neither over-broad nor vague and this, together with the Nevada Supreme Court finding foreclosed the issue that "(S)pecifically, we conclude that Phillips was not denied fair notice of the charge against him because the complaint referred to the Carson funds as being retainer fees." (Appendix to Petition for Writ of Certiorari A-3)

CONCLUSION

Wherefore, Respondent respectfully submits that the questions upon which this cause depends are so unsubstantial as not to require further argument, and Respondent respectfully moves the Court to deny this Petition for Writ of Certiorari, or, in the alternative, that the judgment and order of the Supreme Court of Nevada dated December 6, 1991 should be affirmed.

Respectfully submitted,

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